

House Subcommittee on Commercial and Administrative Law

**TESTIMONY OF DENNIS A. HENIGAN
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IN OPPOSITION TO H.R. 800

March 15, 2005

Chairman Cannon, Ranking Member Watt, Members of the Subcommittee, I appreciate this opportunity to appear before you today. On behalf of Jim and Sarah Brady, and their organizations, let me state my position on H.R. 800 in the most direct and unequivocal terms: *this bill is nothing but a special interest giveaway to the gun lobby and a shameful attack on the legal rights of innocent victims of gun violence.*

As Director of the Legal Action Project at the Brady Center to Prevent Gun Violence,¹ I have the honor to represent, on a pro bono basis, innocent victims of gun violence whose rights would be trampled by this legislation. I have a difficult time explaining to these clients, who have personally faced the horror of gun violence, why the response of the United States Congress to their personal tragedies, and to the continuing national tragedy of gun deaths and injuries, is to give special legal protection to the most reckless members of the gun industry.

Just last week, the GAO reported that suspected terrorists, who are not permitted to board airplanes or cruise ships, repeatedly have been allowed to purchase guns over-the-counter.

The Department of Homeland Security recently issued an alert to all its law enforcement personnel about a Belgian gun maker selling a handgun in America that shoots bullets that penetrate police body armor.

Another gun maker is selling .50 caliber sniper rifles with such extraordinary range and power that they can bring down airplanes.

And gun deaths in America, after a seven-year decline, have started to rise again and are now over 30,000 a year. In the last two weeks, our Nation has learned, once again, that no one is truly safe from gun violence: a judge's family slain in Chicago, a judge and two others murdered in an Atlanta courtroom and, on Saturday, seven worshippers shot and killed while attending church services in Milwaukee.

What is the response of the United States Congress to these clear and present threats to our national safety and security? Is it to move quickly to strengthen the Brady

¹ The Brady Center, and its affiliate, the Brady Campaign to Prevent Gun Violence united with the Million Mom March, are the largest organizations dedicated to creating an America free from gun violence.

background check system to stop terrorist suspects from buying guns? Is it to ban cop-killer guns and terrorist sniper rifles? No. It is to hold hearings on a bill that would protect from legal accountability the most reckless gun sellers in America.

Mr. Chairman, this Congressional response is beyond rational explanation. I suggest the only explanation is the power of the gun lobby.

GUN INDUSTRY IMMUNITY LEGISLATION IS A SHAMEFUL ATTACK ON THE LEGAL RIGHTS OF GUN VIOLENCE VICTIMS

The proponents of this legislation claim it would block only “frivolous” lawsuits against gun sellers brought only to bankrupt the gun industry. Not only is this assertion a gross misrepresentation of the bill, it also is an insult to gun violence victims who have sought justice in the courts – justice that would be denied if this bill became law.

This legislation would provide legal immunity in many cases to grossly irresponsible gun dealers who supply the criminal gun market, as well as to manufacturers of defectively designed firearms. It would throw out of court innocent victims of gun violence, even where courts have found their cases justified by general and established principles of law. Never before has a class of persons harmed by the dangerous conduct of others been so wholly deprived of the right to legal recourse. As Senator Mike DeWine (R-Ohio) stated so eloquently in opposing this legislation of the Floor of the United States Senate a year ago: “I oppose this bill because...it singles out one particular group of victims and treats them differently than all other victims in this country...It denies them their access to court.”

When this bill was debated in the last Congress, two lawsuits, then pending in the courts, were at the center of the debate. Lawyers at the Brady Center represented the victims in both cases. Had this legislation been passed into law last year, these lawsuits would have been blocked.

Gun Industry Immunity Legislation Would Have Deprived Two New Jersey Police Officers of their Legal Rights Against a Reckless West Virginia Pawnshop

The first suit had been filed by two brave New Jersey police officers, David Lemongello and Ken McGuire. Almost two years ago, Officer Lemongello testified before this Subcommittee and told their story. In January of 2001, Dave Lemongello was on a stakeout of a gas station in Orange, New Jersey that had been the target of several armed robberies. He spotted an individual walking near the station who matched the description of a suspect in the robberies. When the officer approached, the individual, career criminal Shuntez Everett, opened fire with a Ruger pistol. Lemongello was hit three times, fell to the ground, and radioed for help. Officer McGuire responded, chased Everett into a nearby backyard, and the two exchanged fire. McGuire also was seriously wounded, but was able to return fire. Everett died from his wounds. The shootings ended the police careers of the two officers.

How was a convicted felon like Shuntez Everett able to obtain a handgun? It turned out that the gun used in the shooting was one of twelve handguns purchased from a West Virginia pawnshop six months before by a gun trafficking team. Tammi Lea Songer, acting as a straw purchaser for gun trafficker James Gray, paid \$4,000 in cash for the guns, after Gray pointed out which guns he wanted. The pawnshop, Will Jewelry and Loan in Charleston, West Virginia, completed the sale, even though it was obvious that the handguns were headed directly into the illegal market. Indeed, the sale was so suspicious that Will reported it to ATF the next day, long after the shop had pocketed the profits and the guns were headed to New Jersey. Ironically, another one of the twelve guns was taken by Ken McGuire from a criminal suspect months before the gas station shooting. Because of the recklessness of a West Virginia gun dealer, Orange, New Jersey became a more dangerous place and the careers of two police officers were ended.

We represented Officers McGuire and Lemongello in a civil damages lawsuit against Will's pawnshop. The suit charged the pawnshop with negligence, and contributing to a public nuisance, in the sale of guns, creating a foreseeable risk that the guns would be used in criminal activity. In March of 2003, Judge Irene Berger of the Kanawha County Circuit Court denied Will's motion to dismiss our case, finding that the officers had stated a legally valid claim under general principles of West Virginia law. If the last Congress had enacted the predecessor of H.R. 800, Judge Berger's ruling would have been superceded and Officers McGuire and Lemongello would have been denied their day in court.

Because gun industry immunity legislation was defeated in the Senate a year ago, the case against Will's pawnshop went forward. In June of last year, Will's settled the case by paying \$1 million in damages to the two officers. As a result of the suit, the pawnshop changed its policies and now no longer engages in large-volume gun sales. Two other gun dealers in the Charleston area have adopted similar policies.

I ask the Subcommittee to consider the outcome of this lawsuit. For these two brave police officers, justice was done. Will's pawnshop was properly held accountable for its reckless sale to a gun trafficking team and it now operates more responsibly. And no one declared bankruptcy. This outcome was possible only because this special interest immunity legislation did not become law.

Gun Industry Immunity Legislation Would Have Deprived the DC-area Sniper Victims of Their Legal Rights Against a Reckless Washington State Gun Dealer and the Assault Weapon Manufacturer that Supplied It

A second lawsuit that would have been blocked by this legislation is the civil damages action brought by the victims of the DC-area sniper shootings. Certainly no one on this Subcommittee will ever forget the paralyzing fear inflicted on this community by the snipers John Lee Muhammad and Lee Boyd Malvo in the Fall of 2002. For some families, that fear became tragedy, as 10 people were killed and four more injured by the snipers. When the snipers were arrested, they were found with the Bushmaster XM-15 assault rifle that had been used in the shootings. The gun was traced back to Bull's Eye

Shooter Supply, a Tacoma, Washington gun shop. Incredibly, though, Bull's Eye had no record of what happened to the gun. The shop had no record of sale, no record of a background check, and had not reported the gun lost or missing. The gun had mysteriously disappeared. Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) audits showed that Bull's Eye had mysteriously "lost" 238 other guns in a three-year period, an average of more than one gun missing every week. Bull's Eye was one of the most irresponsible gun dealers in the Nation. It ranked in the top .27% of gun dealers nationwide in number of missing guns and in the top 1% in the number of guns traced to crime.

Neither Malvo nor Muhammad could legally have purchased a gun. Malvo was a juvenile; Muhammad had a disqualifying domestic violence restraining order on his record. Only through the gross negligence of Bull's Eye could they have obtained the Bushmaster assault rifle. The Brady Center represented eight of the sniper victims and their families in a lawsuit against Bull's Eye, charging that the shop's negligence put a deadly assault rifle in the hands of the killers. We also sued Bushmaster, the manufacturer of the gun, on the ground that companies that make high-firepower assault weapons have a special duty to ensure that their retailers are responsible corporate citizens. Bushmaster did not even require its retail dealers to report to it the results of ATF audits, which would have revealed Bull's Eye's chronic problem of "missing" guns. Indeed, even after the press reported the gun shop's record, Bushmaster stated that it still considered Bull's Eye a "good customer".

In June of 2003, a Washington State trial judge denied motions to dismiss by both Bull's Eye and Bushmaster, deciding that the victims' claims were legally valid under general principles of Washington State law. The Washington State Court of Appeals denied Bushmaster's appeal of this ruling.

As former White House Counsel Lloyd Cutler concluded, after conducting his own independent analysis, the immunity bill that reached the Floor of the Senate in the last Congress would have superceded the judge's ruling and required the sniper case to be dismissed. Because the legislation was defeated, however, the lawsuit brought by the sniper victims went forward. In September of last year, the parties reached a settlement, resulting in the payment, by both Bull's Eye and Bushmaster, of a combined total of \$2.56 million in damages to the victims. Bushmaster also agreed in the settlement to make its dealers aware of programs to encourage safe sales practices by gun retailers – something the company had never done before.

Again, consider the outcome of this lawsuit. The sniper victims received justice. Bull's Eye and Bushmaster were made accountable for their shoddy business practices. And, again, no one declared bankruptcy.

No one can seriously argue that these were "frivolous" lawsuits, and yet they would have been blocked by the immunity legislation. It is hardly surprising that in February of last year, Henry Cohen, a 28-year veteran of the Congressional Research Service and the author of a report on gun industry immunity legislation, stated "it does

not appear the bill would be limited to frivolous lawsuits. That's my neutral assessment."²

Gun Industry Immunity Legislation Would Protect a Careless Gun Manufacturer that Hired Criminals and Allowed Them to Walk Away with Guns

H.R. 800 would also affect currently pending cases brought by gun violence victims. An example is the lawsuit brought by the family of a young man named Danny Guzman, an innocent bystander who was shot on the street in Worcester, Massachusetts on Christmas Eve in 1999. After the shooting, the loaded gun used in the shooting was found behind an apartment building by a four-year-old child. The gun had no serial number.

Police investigators determined that the gun was one of several stolen from Kahr Arms, a Worcester gun manufacturer, by Kahr's own employees who were hired despite their long criminal records. One of the thieves, Mark Cronin, had been hired by Kahr to work in its plant despite his history of crack addiction, theft to support that addiction, alcohol abuse and violence, including several assault and battery charges. Cronin had been able to walk out of the factory with stolen guns, even before they had been stamped with serial numbers. Cronin told an associate that he takes guns from Kahr "all the time" and that he "can just walk out with them." Cronin later pled guilty to the thefts. The investigation also led to the arrest of another Kahr employee, Scott Anderson, who also had a criminal history and who pled guilty to stealing guns from Kahr. At least fifty Kahr firearms disappeared from its manufacturing plant in a five-year period. Worcester Police Captain Paul Campbell classified the record keeping at the Kahr facility as so "shoddy" that it was possible to remove weapons without detection.

Brady Center attorneys represent Danny Guzman's family in a wrongful death suit against Kahr arms, charging Kahr with negligence in completely failing to screen its employees for criminal history and in maintaining a security system so inadequate that employees repeatedly were able to walk out of the plant with unserialized guns. In April, 2003, a Massachusetts trial judge denied Kahr's motion to dismiss the suit, finding it supported by general principles of Massachusetts law. It is now in pretrial discovery. Had immunity legislation been passed, the ruling of the Massachusetts court would have been nullified and Danny Guzman's family would be denied the right to justice against a gun maker that allowed drug criminals to "help themselves" to free lethal weaponry.

**GUN INDUSTRY IMMUNITY LEGISLATION WOULD BE A
"BREATH TAKINGLY RADICAL" REVISION OF LIABILITY LAW FOR THE
BENEFIT OF A SINGLE INDUSTRY**

Far from affecting only "frivolous" lawsuits, H.R. 800 would exempt the gun industry from the oldest principle of our civil liability law: that persons, or companies, who act negligently should be accountable to the foreseeable victims of their negligence. Indeed, in the last Congress, over sixty law professors, from across the country, joined a

² Steve Volk, *Specter Shoots Blanks*, Philadelphia Weekly, February 18, 2004.

letter calling the legislation “breathtakingly radical” because it “affords to a handpicked few – those who make, distribute, and sell guns – special protection against the most commonplace, long-established form of tort liability: accountability to the standard of care required by principles of negligence.” The professors called the immunity bill “one of the most radical statutory revisions of the common law of torts that any legislature – federal or state – has ever considered, let alone passed.”

Proponents of this legislation try to obfuscate its radicalism through arguments that simply misstate the law.

First, they assert that it is unfair to hold the seller of a product responsible for the conduct of a criminal. However, the cases brought by Officers McGuire and Lemongello and the sniper victims did not seek to hold the defendant gun sellers liable simply because guns they sold were used by criminals. Rather, these victims sought to hold the gun sellers liable for their *own* irresponsible conduct that enabled criminals to be armed and to commit violent crimes. The courts in West Virginia and Washington State based their rulings on the longstanding legal doctrine that a defendant can be liable when his own negligent conduct creates a foreseeable risk that a third party will commit a criminal act. Courts, for example, have applied this doctrine to hold landlords liable when their failure to secure their buildings allows criminals to victimize their tenants. It has been applied to drivers who leave their keys in the ignition in high-crime areas, allowing thieves access to a car that is then used to inflict injury on others. Courts in these cases are holding the landlords and the drivers liable for their *own* negligence that enabled someone else to commit a criminal act.

Second, proponents of the bill argue that it is unfair to hold a gun company liable if its product, and its conduct, are entirely legal. This argument confuses criminal liability, which requires a showing of illegal conduct, with civil liability, which does not. The issue in a civil negligence case is whether the defendant has acted with reasonable care, not whether the defendant has violated a statute. For example, when a doctor leaves forceps in a surgical patient, he can be liable for his failure to use reasonable care. There is no requirement that his conduct violate a statute. It is particularly telling that the exception from immunity in H.R. 800 for illegal conduct applies only where a gun manufacturer “*knowingly* violated” a State or Federal gun statute. In other words, under this bill, a gun company is immunized from liability *even if it has violated the law*, as long as the company can demonstrate its ignorance of the law. It is also telling that the proponents of gun industry immunity opposed, and defeated, an amendment offered last year by Senator Levin (D-Mich.) that would have permitted lawsuits where a gun injury or death was caused by “grossly negligent or reckless” conduct by a gun company. Can there be any doubt that the purpose of this legislation is to protect gun manufacturers and dealers from civil liability, *even if their conduct has been grossly negligent, reckless or even illegal?*

Third, the legislation’s supporters assert that they are merely asking the Congress to do what over 30 states have already done. *It is flatly untrue that over 30 states have enacted radical legislation of this kind.* The vast majority of state immunity statutes

apply only to suits brought by local governments and have no effect on the legal rights of individual gun violence victims. In fact, *only five states have enacted legislation that limits the legal rights of individual gun violence victims to the extent of H.R. 800*. For those in Congress who regard themselves as guardians of state prerogatives against federal encroachment, it is fair to ask: Why should Congress override the decisions of 45 states not to strip away the legal rights of gun violence victims?

In virtually all states, victim claims against gun sellers are judged by the courts according to age-old principles of law that apply to everyone else. H.R. 800 is an effort by the United States Congress to impose a special set of legal rules on state courts that apply only to suits against gun companies. This bill is the worst form of special interest legislation. Its passage would be a tribute to the power of the gun lobby and an embarrassment to the country.

GUN INDUSTRY IMMUNITY LEGISLATION WOULD ENDANGER COMMUNITIES BY DESTROYING A STRONG INCENTIVE FOR GUN SELLERS TO BEHAVE RESPONSIBLY

Mr. Chairman, irresponsible conduct by gun sellers has tragic real-world consequences. As the Brady Center lawsuits dramatically show, reckless gun sellers put guns into the hands of criminals and endanger innocent lives. ATF has found from its own gun trafficking investigations that licensed gun dealers are the largest single source of guns trafficked into the underground market.³ Because of irrational statutory limitations on its enforcement powers, and limited resources, ATF is hampered in its efforts to ensure that gun dealers obey the law. The Office of the Inspector General of the Justice Department recently estimated that, at ATF's current rate of inspections, it will take the Bureau *twenty-two years* to inspect all of the approximately 100,000 current federal firearms licensees.⁴ When ATF does inspect dealers, violations of the law often are found, but severe statutory constraints on ATF's license revocation powers make it difficult for the Bureau to take meaningful action. According to the Inspector General, in FY 2003, ATF found that 1,812 of its inspections had revealed violations, *with an average of over 80 violations for each inspection*. However, ATF had issued only 54 notices of license revocation.⁵

The National Rifle Association has worked for years to weaken ATF's enforcement of federal gun laws. It has been tragically successful in this endeavor, by limiting ATF's legal authority and its resources. As a result, it is all the more important to maintain a strong civil liability system to give gun sellers a powerful incentive to behave responsibly. One of the recognized purposes of civil liability is to encourage individuals and companies to use reasonable care to prevent injury to others by ensuring that wrongful and dangerous conduct will result in damages liability. Having weakened

³ *Following the Gun: Enforcing Federal Firearms Laws Against Firearms Traffickers*, Bureau of Alcohol, Tobacco and Firearms (June 2000), at 13.

⁴ *Inspections of Firearms Dealers by the Bureau of Alcohol, Tobacco, Firearms and Explosives*, Report No. I-2004-005, U.S. Dept. of Justice Office of the Inspector General (July 2004), at iii.

⁵ *Id.* at vi.

ATF's enforcement powers, now the gun lobby seeks to remove the only remaining incentive for gun sellers to consider public safety in their business practices. The importance of civil liability was noted by former gun industry insider Robert Ricker, who wrote in a sworn declaration that "until faced with a serious threat of civil liability for past conduct, leaders in the industry have consistently resisted taking constructive voluntary action to prevent firearms from ending up in the illegal gun market."⁶

Far from pursuing legislation to strengthen ATF, proponents of immunity in Congress would rather reassure reckless gun sellers that they need no longer worry about the prospect that courts will hold them accountable to the victims of their conduct. If H.R. 800 passes, it will mean more gun sellers acting with utter contempt for public safety, with disastrous consequences for communities throughout the Nation. This is why, Mr. Chairman, there is substantial opposition to this legislation in the law enforcement community, including the Major Cities Chiefs Association, the International Brotherhood of Police Officers, the Police Foundation, the National Black Police Association, the Hispanic Police Command Officers Association and several state associations of police chiefs.⁷ In addition to recognizing that police officers like David Lemongello and Ken McGuire may be among the gun victims whose rights are infringed by this bill, these organizations also understand that H.R. 800 will only mean more illegal guns on the streets. It only takes a few "bad apple" gun dealers to funnel thousands of guns to criminals. ATF has found that only one percent of licensed gun dealers account for 57% of the guns traced to crime.⁸ These law enforcement organizations agree with us that *good gun dealers don't need legal immunity; bad gun dealers don't deserve it.*

GUN INDUSTRY IMMUNITY LEGISLATION IS FAR MORE RADICAL THAN TORT REFORM

Finally, it is important to distinguish H.R. 800 from other legislation this Congress has considered, and will consider, to reform our civil justice system. This bill is far more radical than any other proposal the Congress will address. Unlike class action reform, H.R. 800 does not simply change the legal forum in which gun liability cases are considered; it protects reckless gun sellers from liability in any forum. Unlike medical malpractice reform, H.R. 800 does not simply limit the amount and kind of damages that can be recovered by gun violence victims against reckless gun sellers; it deprives victims of any recovery. Unlike the asbestos litigation reform proposals, H.R. 800 sets up no alternative to the court system for victims to be compensated; it denies all avenues for compensation. In short, *H.R. 800 gives the gun industry special legal privileges that other industries can only dream about. And it makes the victims of reckless gun sellers*

⁶ Mr. Ricker is a former NRA lawyer and former Executive Director of the American Shootings Sports Council, an industry trade association. His revelations about the gun industry are discussed in greater depth in the attached Brady Center special report, *Smoking Guns: Exposing the Gun Industry's Complicity in the Illegal Gun Market*, which details much of evidence against the gun industry uncovered in litigation.

⁷ A letter opposing H.R. 800 from these organizations, and other members of the law enforcement community, is attached.

⁸ *Commerce in Firearms in the United States*, Bureau of Alcohol, Tobacco and Firearms (February 2000), at 2.

into “second-class” citizens, who lack the basic civil liberties of other Americans who have been injured by the wrongful conduct of others.

For these reasons, on behalf of the Brady Center to Prevent Gun Violence, and the brave gun violence victims we represent in court, I urge you to oppose this legislation. Thank you again for the opportunity to share my views.